



LEGAL DEPARTMENT

FAX TRANSMISSION

STATEMENT OF CONFIDENTIALITY

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Please deliver this cover PLUS 18 page(s) to:

NAME: Bruce Gilliot

COMPANY: WAIS

FAX #: 415-327-6513 PHONE #: _____

Transmitted on 27 Oct 94, at 7:05 ~~AM~~ PM by

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COMMENTS: _____

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CONFIDENTIAL
SOFTWARE DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT ("Agreement") is made as of the ____ day of _____, 1994, between America Online, Inc., a Delaware corporation, with offices located at 8619 Westwood Center Drive, Vienna, Virginia 22182 (hereinafter referred to as "AOL"), and WAIS, Inc., a California corporation, with offices at 1040 Noel Drive, Menlo Park, California (hereinafter referred to as "WAIS").

WHEREAS, WAIS is engaged in the development, marketing, licensing and support of a certain custom and standard computer software products.

WHEREAS, AOL is engaged in the business of providing an interactive online information service ("America Online Service" as defined herein) and works with numerous Information Providers (as defined herein) to publish content for such service;

WHEREAS, AOL provides such Information Providers certain software publishing tools to be used to create and publish content for the America Online Service and AOL desires to provide Information Providers with additional software tools to be used to create and publish content for computer network known as the "Internet."

WHEREAS, WAIS has agreed to develop for AOL a custom computer software product as further described in Exhibit A hereto (the "Custom Product") which will be used by AOL's Information Providers to create and publish content for the Internet;

WHEREAS, WAIS has agreed to license to AOL its standard computer software product (the "Standard Product"), as defined herein, which will be used by Information Providers in conjunction with the Custom Product.

WHEREAS WAIS desires to grant to AOL a non-exclusive right with regard to the Standard Product, and joint ownership rights with regard to the Custom Products all in accordance with the terms and conditions set forth in this Agreement; and

WHEREAS, the parties hereto desire to set forth herein the terms and provisions of their agreements and understandings.

NOW, THEREFORE, in consideration of the foregoing, of the mutual promises hereinafter set forth and of other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound, hereby agree as follows:

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NO EXHIBITS

1. DEFINITIONS.

- 1.1 **Acceptance.** The written evaluation by AOL that a Deliverable meets the specifications of the Project in Exhibit A and is acceptable to AOL.
- 1.2 **Rainman Plus.** The term Rainman Plus shall mean the software tools program developed exclusively by AOL for use by AOL's Information Providers to publish content for distribution over the America Online service [clarify].
- 1.3 **Standard Product.** The term "Standard Product" shall mean the WAIS server for UNIX and a UNIX program, in object code form only, which ~~allows the user of the Standard Product to transfer Hyper-Text Makeup Language (HTML), and all commercially available enhancements, modifications, improvements, and additions thereto, and all commercially available new releases and new versions thereof.~~ → AB - P. 70
- 1.4 **Custom Products.** The term "Custom Products" shall mean the Deliverables as described in Exhibit A hereto [Updated Lightning Functional Specs. Need to incorporate full detailed specifications as updated by WAIS] when such Deliverables are accepted by AOL, and all commercially available enhancements, modifications, improvements, and additions thereto, and all commercially available new releases and new versions thereof.
- 1.5 **Deliverables.** The term "Deliverables" means all items specified in Exhibit A which are to be produced and provided to AOL by WAIS in connection with the Project.
- 1.6 **Documentation.** The term "Documentation" shall mean visually readable materials published or produced by or for AOL during the term of this Agreement for use by any Information Provider with the Standard Product and/or Custom Products.
- 1.7 **Enhancement.** The term "Enhancement" shall mean any modifications, enhancements, revisions (including without limitation revisions to support new releases of any operating system), corrections, updates, upgrades, new versions, additions, extensions, interfaces, and improvements of any type to the Standard Product or Custom Products.
- 1.8 **Object Code.** The term "Object Code" shall mean computer programs assembled or compiled in magnetic or electronic binary form on software media, which are readable and usable by machines, but not generally readable by humans without reverse assembly, reverse compiling, or reverse engineering.
- 1.9 **Project.** The term "Project" shall mean the software development project described in Exhibit A hereto.

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1.10 Related Materials. The term "Related Materials" shall mean all trade secrets, formulae, procedures, know-how, modules, notes, design information, unpublished specifications and descriptions, documents, and knowledge relating to the Standard Product and Custom Products which are useful to AOL in the installation, operation, and use of the Standard Product and Custom Products pursuant to this Agreement.

What is included in the Related Materials?

1.11 Source Code. The term "Source Code" shall mean computer programs written in higher-level programming languages, accompanied by sufficient English-language comments to ensure that it is intelligible to trained programmers which may be translated into Object Code for operation on computer equipment through the process of compiling.

1.12 Information Providers. The term "Information Providers" shall mean entities (including persons) that have contracted with AOL to provide information or materials for use on the America Online interactive information service (the "AOL Service") and who, in connection with such contract, shall be granted a non-exclusive and non-transferable license to use the Custom Products and the Standard Product. Members to the AOL Service shall not be considered Information Providers for the purposes of this Agreement.

on the AOL service machine

1.13 Support. The term "Support" shall mean

What is accepted as support?

(a) providing appropriate direct assistance to AOL in the initial installation and subsequent operation of the Standard Product and Custom Products;

(b) providing adequate guidance and assistance in connection with the use of the Standard Product and Custom Products by telephone on a prompt call back basis to AOL during the term of this Agreement;

(c) modifying or revising the Standard Product and Custom Products to correct defects and errors, including, but not limited to, such corrections, fixes, by-passes, replacements or circumventions as may be required: (a) for Information Providers to use the Standard Product and Custom Products in accordance with applicable Documentation; (b) to ensure that the Standard Product and Custom Products are in compliance with the warranties provided by AOL to its Information Providers; and (c) to make the Standard Product or Custom Products non-infringing as to the rights of any third party (or to procure such rights in the Standard Product or Custom Products from such third party); and where appropriate, revising the Documentation in a consistent manner; and

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(d) promptly providing all Enhancements to the Standard Product which are made generally available to WAIS licensees.

- 1.14 Lightning System. The term "Lightning System" shall mean a computer software product which AOL produces, or causes to be developed and produced, by integrating, bundling, incorporating or otherwise combining the Standard Product with the Custom Products and/or other computer software products for use by AOL's Information Providers.

2. DEVELOPMENT OF CUSTOM PRODUCTS.

- 2.1 Project. The objective of the Project is the development and delivery of the of the Custom Products by WAIS to AOL no later than December 15, 1994 in Beta version, and no later than February 15, 1995 in final version. In the event that WAIS fails to deliver the Custom Products by February 15, 1995, then for each day past such date, one thousand dollars (\$1000) shall be deducted from the total payments due to WAIS, as provided in Section 2. below. Exhibit A attached hereto [Updated Lightning Functional Specs] sets forth specific development objectives for the Project and, the Deliverables for the Project, as well as the engineering plan and design pursuant to which the Project is to be completed. WAIS will implement the Project and has responsibility for the Project, including without limitation the design, coding, documentation, quality assurance and testing of the Custom Products.

- 2.2 Creation of the Custom Products. In connection with its implementation of the Project pursuant to this Article 2, WAIS agrees to:

- (a) Consult with AOL, as necessary for the implementation of the Project, and provide AOL with progress reports;
- (b) Commit and utilize sufficient resources and qualified personnel to implement the Project on a timely basis as specified below;
- (c) Notify AOL of any factor, occurrence or event which is reasonably anticipated by WAIS to affect its ability to meet any of its material obligations;
- (d) Deliver the Deliverables consistent with the Project and its deadlines;
- (e) Maintain appropriate records and back-up materials throughout the term of the Project; and

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(f) Following Acceptance by AOL, provide AOL with a complete copy of all Source Code and Object Code versions of the Custom Products, as well as a copy of all existing Documentation and other Related Materials.

Noted (g) WAIS shall, at the reasonable request of AOL, enhance the Custom Products in order to meet the market demands, needs, and opportunities. AOL shall pay WAIS for said enhancements at WAIS's then-current consulting rates.

- 2.3 Documentation. WAIS shall produce technical Documentation in connection with the Project which shall be sufficient to allow AOL's Information Providers, who are reasonably skilled in the use of Rainman Plus, to become proficient in the publication of their text and graphics content for distribution over the Internet.
- 2.4 Acceptance Testing. Upon completion by WAIS of any Deliverable in accordance with the Project, WAIS shall deliver the Deliverable to AOL. Following its receipt of such Deliverable, AOL shall perform and conduct tests to determine that the Custom Products perform to specifications set forth in Exhibit A. AOL may reject the Deliverable only if the Deliverable does not comply with the specifications set forth in Exhibit A and only by giving WAIS written notice of such non-compliance (including, but not limited to, specification and documentation of the non-compliance upon which the rejection is based) within thirty (30) days from the receipt of the Deliverable. If the Deliverable being tested does not successfully meet the Acceptance Test, WAIS will use best efforts to effect appropriate corrections and shall resubmit the Deliverable for Acceptance Testing within five (5) days of receipt of the notice of rejection, at which time AOL shall reperform Acceptance Testing to determine whether the Custom Products perform to specifications set forth in Exhibit A. If there is continued substantial non-compliance, AOL shall provide WAIS with written notice of such rejection no later than ten days after performance of such tests and AOL shall be entitled to prompt refund of all payments made to WAIS hereunder, except for the AOL's initial payment to WAIS of \$25,000 (twenty-five thousand dollars).
- 2.5 Delivery on Acceptance Date. As soon as practicable after Acceptance with respect to a given Deliverable, WAIS shall deliver to AOL a complete copy of any software covered thereby, and other Deliverables not yet supplied, which are required in connection therewith pursuant to the Project.

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- 2.6 **AOL Assistance.** In order to enable WAIS to perform its duties pursuant to the Project and under this Agreement, AOL shall provide the following to WAIS at no cost to WAIS during the implementation of the Project by WAIS:
- (a) A reasonably sufficient number of complete, current copies of the appropriate and available Documentation and Related Materials for the Rainman Plus in print and machine readable format and certain examples of AOL's source code format; and
 - (b) Reasonable access to AOL employees who are well-qualified experts on Rainman Plus. These AOL-employed experts shall use reasonable efforts to provide prompt assistance to WAIS upon request by WAIS in all aspects of the implementation of the Project, including, without limitation, providing WAIS with information, advice, counseling, education and solutions to problems encountered by WAIS. Unless WAIS indicates that the urgency of a particular situation requires faster communication, the mode of communication between WAIS and AOL pursuant to which AOL shall fulfill its obligations under this Section 2.6(b) shall be facsimile.
- 2.7 **Project Management.**
- 2.7.1 **WAIS Project Manager.** The WAIS Project Manager shall be the WAIS's representative and point of contact for the resolution of problems related to managing the Project, and shall participate and cooperate in the coordination of activities between WAIS and AOL. The WAIS Project Manager shall also have primary responsibility for, and control over, the development of the Custom Products and management of the Project, subject to appropriate WAIS internal procedures and controls. The WAIS Project Manager shall plan, staff, implement and manage the Project. Upon reasonable prior request of the AOL Project Manager, the WAIS Project Manager shall allow the AOL Project Manager during reasonable business hours reasonable consultation with the relevant WAIS personnel (as reasonably designated by the WAIS Project Manager) and to have reasonable access to the Custom Products Deliverables for the purpose of reviewing the progress of the Project.
 - 2.7.2 **AOL Project Manager.** The AOL Project Manager shall be AOL's representative and the AOL point of contact for the resolution of problems related to managing the Project, and shall participate and cooperate in the coordination of activities between AOL and WAIS. The AOL Project Manager shall also have primary responsibility for and control over the management of AOL's contribution to the development of the

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Custom Products as set forth in this Agreement, subject to appropriate AOL internal procedures and controls. Upon reasonable prior request of the WAIS Project Manager, the AOL Project Manager shall allow the WAIS Project Manager during reasonable business hours to consult with the relevant AOL personnel.

- 2.7.3 Notice. Within seven (7) days of the signature of this Agreement each party shall provide the other party with written notice of the identity of its Project Manager. During the Project, seven (7) days prior written notice shall be given in the event either party elects to change its Project Manager.
- 2.7.4 Authority. Each party shall vest its Project Manager with the authority necessary to carry out his or her obligations and responsibilities hereunder. Each party may assume the other party's Project Manager is acting within the scope of his or her authority.
- 2.8 Payments. The parties acknowledge that Customer has already paid WAIS \$25,000 (twenty-five thousand) in connection with background work relating to Project. Upon AOL's acceptance of the Beta version of the Custom Products and FDO forms, which shall be delivered in accordance with the schedules set forth herein, AOL shall pay WAIS \$50,000 (fifty-thousand dollars). Upon AOL's acceptance of the final version of the Custom Products and all deliverables associated therewith, which shall be delivered in accordance with the schedules set forth herein, AOL shall pay WAIS \$25,000 (twenty-five thousand dollars).
- 2.9 Tax Withholdings. In the event that applicable tax law requires AOL to withhold any tax from any payments due to WAIS, AOL shall provide WAIS with appropriate available information, receipts and copies of forms or information relating to such withholdings. Each party shall pay all duties and taxes, however designated, imposed as a result of the existence or operation of this Agreement upon it, including, but not limited to, sales tax, import or export duty or tax.
- 2.10 Joint Ownership. Upon AOL's acceptance of each Deliverable hereunder, WAIS irrevocably shall be deemed to assign to AOL joint right, title and interest, throughout the world and without restriction, in all copyrights, trade secrets, patentable materials, and all other proprietary rights in the Custom Products and each Deliverable received and all the items and components thereof. WAIS joint ownership rights in such Custom Products shall mean that WAIS retains the right to utilize Commonly Used Code in programs developed for others or for its own use. Commonly Used Code shall mean computer code, techniques, functions, routines, and subroutines

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that are common in the computer industry and computer programming methods in common use.

3. LICENSING OF STANDARD PRODUCT.

3.1 Licenses Granted by WAIS

3.1.1 Grant of Object License. WAIS hereby grants to AOL a non-exclusive license to use one (1) master copy of the object code (the "Master Copy") of the Standard Product, and one (1) copy of any Documentation during the term of this Agreement for the purposes of sublicensing the Standard Product to AOL's Information Providers for use in conjunction with the Custom Products and as part of the Lightning System.

3.1.2 Trademarks, Copyrights, Trade. WAIS hereby grants to AOL a non-exclusive world-wide, no-cost license to use any of WAIS's copyrights, trade names, trademarks, patents, and service marks relating to the Standard Product. To the extent permitted by law, WAIS authorizes AOL to include WAIS's name (either solely or together with AOL's name), on any copyright, trade names, trademarks, patent, or service mark notice of any kind whatsoever relating to the Standard Products, Custom Products, and/or Lightning System.

3.2 Reproduction, Use, and Distribution of the Standard Products.

3.2.1 AOL may make a copy of:

(a) any Master Copy of the Standard Product for the purpose of integrating, bundling, incorporating or otherwise combining such Standard Product with the Custom Products into a Lightning System; and

(b) any Lightning System into which a Master Copy of the Standard Product and/or the Custom Products have been integrated, bundled, incorporated or combined, and directly or indirectly distribute or furnish such copy to a Subscriber and/or use such copy for its internal use, for development, support, demonstration, marketing, sales and other reasonable business purposes.

3.2.2 AOL agrees not to remove any copyright notice or other proprietary markings from the Master Copy of the Standard Product, and each copy of the Standard Product made therefrom shall contain the same copyright notice and proprietary markings contained in or appearing on the Master Copy. Notwithstanding the foregoing, AOL may market the Lightning System under any product name it selects, and shall

have no obligation to use the trademarks of WAIS or the name of WAIS in connection with the Standard Product, the Custom Products or the Lightning System.

3.3 Reproduction of Documentation. AOL may make such number of copies of Documentation as it deems appropriate. The Documentation may be merged by AOL with other documentation in connection with the marketing and licensing of the Lightning Systems.

3.4 Standard Production of Lightning System by AOL.

3.4.1 Appointment of AOL. WAIS hereby authorizes and appoints AOL to develop and produce, or cause to be developed and produced, Lightning Systems. WAIS also hereby authorizes AOL, its subsidiaries, distributors, OEM's, VAR's, agents, partners and dealers, to license, market and support such Lightning Systems to Information Providers located throughout the world.

3.4.2 Duties of AOL. During the term of this Agreement, AOL shall be responsible for the development, production, enhancement, marketing, licensing, distribution, installation, maintenance and support of the Lightning System, including, but not limited to:

(a) providing information regarding the Lightning System to Information Providers and counseling Information Providers on the use of the Lightning System;

(b) marketing the Lightning System in accordance with policies and procedures adopted by AOL;

(c) providing appropriate documentation to Information Providers relating to installation and operation of the Lightning System;

(d) providing appropriate support to Information Providers for the Lightning System;

(e) distributing to Information Providers any new releases of the Lightning System and any related Documentation; and

(f) immediately advising WAIS of any legal notices served on, or legal actions commenced against, AOL regarding any of the Standard Product or the Custom Products.

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3.6 **Standards of Performance.** AOL shall perform its duties described herein in accordance with the provisions hereof and in a reasonable and business-like manner reasonably intended to preserve the business reputation of WAIS and AOL and proprietary rights of WAIS in the Standard Product, Custom Products, and Documentation. AOL shall use reasonable efforts to perform all duties hereunder in compliance with applicable laws, regulations, orders and other legal requirements to which it is subject in the conduct of its activities hereunder.

3.7 **Duties of WAIS.**

3.7.1 **Items to be Furnished by WAIS.** WAIS shall furnish to AOL the following materials and services:

(a) the master copy of the Standard Product in Object Code form;

(b) the Documentation and Related Materials for the Standard Product and Custom Products at the time of delivery to AOL;

(c) one (1) copy of any corrections, fixes, and bypasses for the Standard Product in Object Code form, and revisions to the Documentation in connection therewith, which exist at the time of delivery of the Standard Product to AOL;

(d) reasonable training via telephone at AOL's request to AOL's support personnel to enable such personnel to provide Support to Information Providers and to provide installation, operation, maintenance, and of the Lightning System.

3.7.2 **Support.** During the term of this Agreement, WAIS shall provide Support to AOL for the Standard Product at least at the same level as is made available by WAIS to other Distributors and/or Customers, and at a level sufficient to enable AOL to provide support to its Information Providers and to exploit its rights under this Agreement.

3.7.3 **Extra Cost Enhancements.** WAIS shall, at the reasonable request of AOL, enhance the Standard Product in order to meet the market demands, needs, and opportunities. AOL shall pay WAIS for said enhancements at WAIS's then-current consulting rates.

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3.7.4 Standard of Performance. WAIS agrees to use best efforts to provide AOL with the Standard Product, Documentation, and Support described in this Agreement.

4. TERM AND TERMINATION.

- 4.1 Term of Agreement.** The initial term of this Agreement shall be for the five (5) year period commencing on the date hereof; provided, however, that this Agreement shall be renewed automatically for consecutive twelve-month periods, unless terminated by either party on one year's prior written notice, effective on the first day of any Renewal Term. In the event of any such renewal or extension, all references herein to the term of this Agreement shall include the term of all such renewals or extensions.
- 4.2 Earlier Termination.** Either party shall have the right to terminate this Agreement on one hundred eighty (180) days' prior written notice to the other party in the event of a material breach by the party of its material obligations as specified in this Agreement. Either party shall have the right to terminate this Agreement in its entirety immediately upon written notice in the event (i) that the other party shall become insolvent or otherwise unable to pay its debts as they become due or upon the filing of any bankruptcy or insolvency proceeding by or against the other party; (ii) any "change of control of the other party, which, for purposes hereof, shall mean any transfer or series of transfers resulting in the beneficial ownership of fifty percent (50%) or more of the equity interest or voting control of a party.
- 4.3 Right to Cure.** Notwithstanding the foregoing provisions of this Article 4, each party shall have the right to cure any breach upon which the other party proposes to terminate this Agreement pursuant to this Article 4; provided, however, that such breach shall be cured to the satisfaction of such party which proposes to terminate on or prior to the date upon which such termination shall otherwise be deemed effective hereunder. Notwithstanding the foregoing, this Agreement (or any part thereof) shall not be deemed terminated for as long as the party which is alleged to have breached this Agreement shall have been exercising its best efforts to cure such breach.
- 4.4 Rights Upon Termination.** Notwithstanding any termination or expiration of this Agreement, (i) AOL shall have complete ownership rights in the Custom Products; (ii) AOL shall be entitled to continue to receive thereafter any and all revenues payable to AOL under any agreement AOL entered into pursuant to the provisions of this Agreement prior to any such termination or expiration; (iii) no such termination or expiration shall affect in any way the validity or effectiveness of any such agreement entered into by AOL or then proposed to be entered into by AOL; (iv) AOL shall be entitled to retain the Standard Product and the Custom Products and

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Documentation for the purpose of fulfilling its obligations under any such agreement; and (iv) AOL may sell through any inventory Lightning Systems which have been produced or for which production has been contracted for, and AOL's license and marketing rights shall continue until such inventory is exhausted or AOL elects to cease licensing the Lightning System, whichever is sooner.

Each party shall provide sufficient maintenance and enhancement for its components of the Lightning System in accordance with the terms of this Agreement to satisfy AOL's contractual obligations to the Information Providers in a reasonable manner sufficient to protect AOL's business reputation. Notwithstanding any expiration or termination of this Agreement (1) the rights of any Information Providers shall not be affected in any manner; and (2) AOL shall have the right to retain copies of the Standard Product and Custom Products to provide corrections of errors and maintenance to its Information Providers for the Value Added Standard Products and to otherwise fulfill its obligations to its Information Providers and protect its business reputation. WAIS agrees to provide support and assistance as required by this Agreement during such time as AOL is selling through its inventory.

5. REPRESENTATIONS, WARRANTIES AND COVENANTS BY WAIS.

As a material inducement to AOL to enter into this Agreement, WAIS makes the following representations, warranties and covenants to AOL, each of which shall be true and correct as of the date hereof and during the period while this Agreement is in effect, including any period subsequent to termination during which certain provisions survive:

- 5.1 **Product Warranty.** WAIS warrants to AOL that at the time of initial delivery of the Standard Product and Custom Products to AOL hereunder, and at each subsequent delivery of the Standard Product and Custom Products and Documentation hereunder, and for a period of one (1) year following the date of delivery of the Standard Product and Custom Products to Information Providers pursuant to the Terms of Service Agreement (i) the magnetic media supplied to AOL shall be free from defects in workmanship and materials, and (ii) the Standard Product and Custom Products shall operate in accordance with the specifications set forth in Exhibit A hereto, and in accordance with the applicable specifications set forth in the then-current Documentation. THE PROVISIONS OF THIS SECTION HEREOF ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, WHETHER IMPOSED BY CONTRACT, STATUTE, COURSE OF DEALING, CUSTOM OR USAGE OR OTHERWISE.

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- 5.2 **Due Organization: Good Standing.** WAIS is a corporation duly organized, validly existing and in good standing under the laws of the State of California, and has full corporate power and legal right to execute, deliver and perform this Agreement, and all action necessary for the valid execution of this Agreement has been duly taken by WAIS.
- 5.3 **Title.** WAIS has full and exclusive right, title and ownership in the Standard Product and Custom Products and Documentation and any related patents, copyrights, trademarks, service marks, trade names and trade secrets licensed to AOL hereunder, free and clear of all liabilities (contingent or otherwise), charges, obligations, security interests, restrictions, and other encumbrances.
- 5.4 **No Conflicts.** There is no commitment, understanding, option, or agreement whatsoever, written or oral, pursuant to which any individual or entity other than WAIS has any claim, right, title to or interest in any or all of the Standard Product or Custom Products or parts thereof which conflicts with the terms and conditions of this Agreement and AOL's rights pursuant hereto.
- 5.5 **No Default.** The execution and delivery of this Agreement and the consummation of the transactions contemplated hereby do not conflict with, violate or constitute a default under any constituent or governing instrument of WAIS, any statute, rule, order or regulation or any other contract or other instrument to which WAIS is a party or by which it is bound.
- 5.6 **No Litigation.** There is no litigation, claim, proceeding, or investigation pending or threatened with respect to any aspect of the Standard Product or Custom Products or the transactions contemplated by this Agreement.
- 5.7 **No Infringement.** There are no claims, nor facts known to WAIS which might lead to any claim, by third parties of infringement of any rights relating to the Standard Product and Custom Products or arising as a result of this agreement or any acts contemplated by, or taken in furtherance of, this Agreement.
- 5.8 **Sufficient Resources.** WAIS warrants that it has sufficient facilities, resources, and personnel to adequately develop, maintain and enhance the Standard Product and Custom Products and perform its duties hereunder in a commercially reasonable manner and it agrees to commit such resources to such purposes.

DRAFT 10/27/94**6. REPRESENTATIONS, WARRANTIES AND COVENANTS BY AOL.**

As a material inducement to WAIS to enter into this Agreement, AOL makes the following representations and warranties to WAIS, each of which shall be true and correct as of the date hereof and during the period this Agreement is in effect including any period subsequent to termination during which certain provisions survive:

- 6.1 **Due Organization; Good Standing.** AOL is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware.
- 6.2 **Right and Authority.** AOL has full corporate power and legal right to execute, deliver and perform this Agreement. All corporate action of AOL necessary for the execution, delivery and performance of this Agreement has been duly taken.
- 6.3 **No Default.** The execution and delivery of this Agreement and the consummation of the transactions contemplated herein do not conflict with, violate, or constitute a default under, AOL's Certificate of Incorporation or Bylaws, any U.S. statute, rule, order or regulation or any contract or commitment to which AOL is a party or by which it is bound.
- 6.4 **Sufficient Resources.** AOL warrants that it has sufficient facilities, resources and personnel to adequately market, license, distribute, and support the Standard Product and Custom Products in a commercially reasonable manner, consistent with AOL's judgment, and it agrees to commit such resources to such purposes.

7. LIMITATION OF LIABILITY.

Notwithstanding any other provision of this Agreement, and except for claims based on or arising from the infringement or alleged infringement of the intellectual property rights of a third party (including, without limitation, copyrights, trademarks, patents, and trade secrets), neither party shall be liable for loss of profit, goodwill or other special or consequential damages suffered by the other party whether or not the possibility of such damage was disclosed to or could have been reasonably foreseen by such party. Each party's liability for any claim for damages for breach of this Agreement, except as provided in this Article 7, shall be limited to direct damages and shall not exceed the fees which have been paid by AOL for the Standard Product and Custom Products which are the subject of the alleged breach.

DRAFT 10/27/94**8. INDEMNIFICATION**

WAIS agrees to defend, indemnify and hold AOL harmless against any loss, damage, expense, or cost, including reasonable attorneys' fees, arising out of any claim, demand, proceeding, or lawsuit by a third party based on any assertion that the Program breaches the patent, copyright, or trade secret rights of such third party.

9. NONDISCLOSURE OF PROPRIETARY INFORMATION.

9.1 **Title in WAIS.** AOL acknowledges and agrees that the Standard Product constitutes valuable property of WAIS, that all title and ownership rights to the Standard Product shall remain exclusively with WAIS, and that AOL's rights to the Standard Product are limited to those specifically granted in this Agreement. WAIS reserves all rights with respect to the Standard Product under all laws for the protection of proprietary information, including trade secrets, copyrights and patents.

9.2 **Non-disclosure by AOL.** In order for AOL to effectively market and sublicense, and to provide services for, the Standard Product and Custom Products, it is necessary and desirable for WAIS to disclose to AOL Proprietary Information relating to WAIS's business activities, the Standard Product and Custom Products, and other of its technical and proprietary information. AOL shall use reasonable efforts to hold all proprietary information in confidence and to avoid any use or disclosure other than as permitted by this Agreement or as otherwise authorized by WAIS. WAIS proprietary information shall be safeguarded by AOL in the same manner it safeguards confidential materials or data relating to its own business, and which shall include requiring its employees to sign an agreement prohibiting the unauthorized use or disclosure of AOL and certain third party proprietary information.

9.3 **Non-disclosure by WAIS.** In order for WAIS to provide the Standard Product and Custom Products and related services hereunder, it is necessary and desirable for AOL to disclose to WAIS confidential and proprietary information relating to AOL's business activities, its Rainman Plus, its Lightning Systems, and other of its technical and proprietary information. WAIS shall use reasonable efforts to hold all AOL proprietary information in confidence and to avoid any use or disclosure thereof other than as permitted by this Agreement or as otherwise authorized by AOL. AOL's proprietary information shall be safeguarded by WAIS in the same manner it safeguards confidential materials or data relating to its own business, and which shall include requiring its employees to sign an agreement prohibiting the unauthorized use or disclosure of WAIS and certain third party proprietary information.

9.4 **Exclusions.** For purposes of this Agreement, Proprietary Information shall not include:

- (a) Information generally available to or known to the public without the fault of the recipient;
- (b) Information known to recipient or in recipient's possession at the time of disclosure;
- (c) Information independently developed for the recipient outside the scope of this Agreement;
- (d) Information approved for release by the discloser;
- (e) Information rightfully received from a third party without a restriction on disclosure; and
- (f) Information disclosed by recipient under obligation created by law, regulation or court order.

10. MISCELLANEOUS.

- 10.1 **No Agency.** Neither party to this Agreement is an agent, partner, joint venturer, or employee of the other, each party being an independent contractor of the other. Neither party has the right to bind the other to any agreement with a third party or to incur any obligation or liability on behalf of the other party or to make any warranty on behalf of the other party, except as specifically provided herein. AOL shall be authorized to withhold any taxes on amounts payable to WAIS in accordance with applicable law.
- 10.2 **Assignability.** Neither party shall sell, assign, transfer, convey, delegate or encumber any or all of its duties, obligations, rights or interest hereunder, whether voluntarily, involuntarily, by operation of law or otherwise, without the prior written consent of the non-assigning party, which consent shall not be unreasonably withheld or delayed; provided, however, that AOL may make such partial assignments and delegations as it deems appropriate to third parties who are sublicensing the Standard Product and Custom Products pursuant to a technology license granted by AOL.
- 10.3 **Notices.** All notices permitted or required to be given under this Agreement shall be deemed to have been duly given if such notice or communication shall be in writing and sent by overnight delivery, airmail, cable, telegram, telex, facsimile transmission or other means of prepaid delivery, postage or costs of transmission and delivery prepaid, to the party for whom it is intended at the address set forth below, until such time as either party hereto shall give the other party

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hereto notice of a change of address and/or Fax number in accordance with the provisions of this Section 9.3.

If to AOL:

America Online, Inc.
8619 Westwood Center Drive
Vienna, VA 22182
Attention: General Counsel
Fax: (703) 448-9164

If to WAIS:

WAIS, Inc.
1040 Noel Drive
Menlo Park, California

- 10.4 Waiver. The failure by either party to exercise any right or option it is granted herein, or to require the performance of any term of this Agreement, or the waiver by either party of any breach of this Agreement, shall not prevent a subsequent exercise or enforcement of such terms or be deemed a waiver of any subsequent exercise or enforcement of such terms or be deemed a waiver of any subsequent breach of the same or any other term of this Agreement.
- 10.5 Modification Or Amendment. Any modification or amendment of any provision of this Agreement must be in writing and bear the signature of the authorized representative of both parties.
- 10.6 Governing Law: Severability. The validity of this Agreement and the rights, obligations and relations of the parties hereunder shall be construed and determined under and in accordance with the substantive laws of the Commonwealth of Virginia and without regard to the rules governing conflicts of law; provided, however, that if any provision of this Agreement is adjudged by a court of competent jurisdiction to be in direct violation of any applicable law, such provision shall to such extent as it shall be determined to be illegal or unenforceable under such law be deemed null and void, but this Agreement shall otherwise remain in full force and effect. The parties hereby submit to the exclusive jurisdiction of any appropriate Federal and state court in the Commonwealth of Virginia, and hereby consent to service of process in order to submit to such jurisdiction, for purposes of resolving any dispute arising in connection with this Agreement.

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- 10.7 **Complete Agreement.** This Agreement sets forth the entire agreement between the parties hereto with regard to the subject matter hereof and merges all discussions between them and annuls and replaces any and every other agreement which may have existed between AOL and WAIS to the extent that any such agreement relates or related to the establishment of an arrangement for the development or production of any computer software program or computer system into which the Standard Product and Custom Products are integrated, bundled, incorporated or otherwise combined or the distribution, marketing, license or support of any such computer software product or computer system.
- 10.8 **Publicity.** Neither party shall publicize or disclose to any third party by any means any of the financial or business terms or provisions of this Agreement, or the discussions relating thereto, without the prior written consent of the non-disclosing party, except as required by law, regulation, or court order, and except as AOL is required to disclose pursuant to the U.S. securities laws and regulations. Consent shall not be unreasonably withheld or delayed.
- 10.9 **Costs.** Each party shall bear its own costs and expenses in connection with this Agreement.
- 10.10 **Headings.** The headings contained herein are for convenience of interpreting any of the provisions hereof.
- 10.11 **Taxes and Expenses.** Each party hereby covenants and agrees to assume and pay all U.S. and foreign taxes imposed upon it as a result of this Agreement and its performance hereunder.
- 10.12 **Survival.** Notwithstanding the expiration or termination of this Agreement or any renewal period hereof, it is acknowledged and agreed that those rights and obligations which by their nature are intended to survive such expiration or termination shall survive.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized representatives.

AMERICA ONLINE, INC.
8619 Westwood Center Drive
Vienna, VA 22182

WAIS, INC.
1040 Noel Drive
Menlo Park, California

By: _____

By: _____

Print Name: _____

Print Name: _____

Title: _____

Title: _____